

Dena C. Sharp (State Bar No. 245869)  
Adam E. Polk (State Bar No. 273000)  
**GIRARD SHARP LLP**  
601 California Street, Suite 1400  
San Francisco, CA 94108  
Tel: (415) 981-4800  
Fax: (415) 981-4846  
dsharp@girardsharp.com  
apolk@girardsharp.com

Eric H. Gibbs (State Bar No. 178658)  
Amy M. Zeman (State Bar No. 273100)  
**GIBBS LAW GROUP LLP**  
505 14th Street, Suite 1110  
Oakland, CA 94612  
Tel: (510) 350-9700  
Fax: (510) 350-9701  
ehg@classlawgroup.com  
amz@classlawgroup.com

*Counsel for Plaintiffs*

[Additional Counsel on Signature Page]

Marc G. Cowden  
Adam Stoddard  
**SHEUERMAN, MARTINI, TABARI,  
ZENERE & GARVIN**  
A Professional Corporation  
1033 Willow Street  
San Jose, California 95125  
(408) 288-9700  
Fax: (408) 295-9900  
mcowden@smtlaw.com  
astoddard@smtlaw.com

John J. Duffy  
Kevin M. Ringel  
**SWANSON, MARTIN & BELL, LLP**  
330 N Wabash, Suite 3300  
Chicago, Illinois 60611  
Tel: (312) 321-9100  
Fax: (312) 321-0990  
jduffy@smbtrials.com  
kringel@smbtrials.com

*Counsel for Defendant Chart Inc.*

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

IN RE PACIFIC FERTILITY CENTER  
LITIGATION

Case No. 3:18-cv-01586-JSC

**JOINT CASE MANAGEMENT  
STATEMENT**

Judge: Hon. Jacqueline Scott Corley

Pursuant to Local Rule 16-10(d), the parties provide this Joint Case Management Statement in advance of the Further Case Management Conference scheduled for February 24, 2021.

## **I. DEVELOPMENTS SINCE LAST STATUS CONFERENCE**

Since the last case management conference, the parties have completed their *Daubert* and summary judgment briefing and continue with trial preparation. The parties have also begun discovery relating to the first Additional Case in accordance with this Court’s Order Regarding Additional Trials. Dkt No. 620.

The parties have continued to confer regarding a plan for alternative dispute resolution and trial format. As is reflected below, while the parties have agreed on an ADR plan, the parties have differing views on trial format. Plaintiffs request that trial proceed in May using remote means if necessary. Chart requests an in person trial.

## **II. TRIAL DATE AND FORMAT**

The parties have met and conferred regarding the upcoming trial date in May 2021.

***Plaintiffs’ position.*** The only alternative to a remote trial in May is indefinite delay. Nearly a year into the pandemic, the entire Bay Area is still in the “purple” tier and an overwhelming majority of the population still awaits vaccination. *Tracking COVID-19 in California*, <https://covid19.ca.gov/state-dashboard/> (Feb. 16, 2021). Plaintiffs understand that once in-person jury trials resume, the Northern District of California plans to hold no more than three jury trials at a time, with one trial per courthouse. With such limited courtroom space, in-person civil jury trials will surely face further delays, as they are “parked behind a long line of criminal jury trials which will necessarily have greater claim to available courtroom access.” *See Kieffaber v. Ethicon, Inc.*, No. CV 20-1177-KHV, 2021 WL 425822, at \*2 (D. Kan. Feb. 8, 2021).

Ordinarily, a party seeking a continuance must show that delay is warranted and that they would be prejudiced if the trial were to proceed as scheduled. *See United States v. Kloehn*, 620 F.3d 1122, 1127 (9th Cir. 2010) (citation omitted). Chart has thus far made no showing of prejudice associated with a remote jury trial. Plaintiffs, in contrast, will be prejudiced if the trial does *not* proceed as scheduled, because any delay is likely indefinite. “Justice delayed is justice denied, the saying goes.” *Schroeder v. City of Chicago*, 927 F.2d 957, 960 (7th Cir.1991). “Rule 1 of the Federal Rules of Civil Procedure

1 commands this Court *and* the parties to utilize the Rules to ‘secure the just, speedy and inexpensive  
 2 determination of every action and proceeding.’ Under present conditions, [a remote trial] appears to be  
 3 the best we can do. Fairness and the law dictate nothing less.” *Flores v. Town of Islip*, No. 18-cv-3549-  
 4 GRB-ST, 2020 WL 5211052, at \*3 (E.D. N.Y. Sept. 1, 2020) (quoting Fed. R. Civ. P. 1). Plaintiffs have  
 5 already waited nearly three years for their day in court, and delay of this first trial will inevitably delay  
 6 resolution of the proceedings.

7 While plaintiffs recognize that the Court is inclined to require the parties’ mutual consent to a  
 8 remote trial, the Court has the authority to compel a trial by videoconference, even over objections. That  
 9 authority “derives from Federal Rules of Civil Procedure 77(b) and 43(a).” *Gould Elecs. Inc. v.*  
 10 *Livingston Cty. Rd. Comm’n*, 470 F. Supp. 3d 735, 738 (E.D. Mich. 2020). Rule 43 allows remote  
 11 testimony “[f]or good cause in compelling circumstances and with appropriate safeguards.” Fed. R. Civ.  
 12 P. 43(a). And Rule 77(b) provides that “[e]very trial on the merits must be conducted in open court and,  
 13 so far as convenient, in a regular courtroom.” Fed. R. Civ. P. 77(b). As *Gould* explained, remote trials  
 14 satisfy the “open court” requirement, and “the tenor of Rule 77(b)—as evidenced by the phrase ‘so far as  
 15 convenient’—is the allowance for flexibility in conducting trials in non-traditional ways when  
 16 exigencies make traditional procedures impracticable.” 470 F. Supp. 3d at 738.

17 A growing number of district courts have held that the pandemic presents compelling  
 18 circumstances under Rule 43, ordering jury trials to proceed remotely over a party’s objection. *See e.g.*,  
 19 *Kieffaber*, 2021 WL 425822, at \*1-2 (ordering remote jury trial using protocols “successfully pioneered  
 20 in the Western District of Washington”); *Guardant Health, Inc. v. Found. Med., Inc.*, No. CV 17-1616-  
 21 LPS-CJB, 2020 WL 6120186, at \*1-4 (D. Del. Oct. 16, 2020) (hybrid with parties and witnesses remote,  
 22 jurors in person). Even more courts have ordered bench trials to proceed remotely over objection, under  
 23 the same analysis. *See, e.g., Flores*, 2020 WL 5211052, at \*3; *Gould*, 470 F. Supp. 3d at 741; *Argonaut*  
 24 *Ins. Co. v Manetta Enters., Inc.*, 2020 WL 3104033, at \*2 (E.D. N.Y. June 11, 2020). The parties  
 25 anticipate a two-week trial, which is not too long or complicated to hold remotely. *See Kieffaber*, 2021  
 26 WL 425822, at \*3 (two-week trial “easily falls within the heartland of cases that are amenable to remote  
 27 trial proceedings,” and complex scientific testimony may be *more* effective via video than in person,  
 28

1 where jurors will be “masked (maybe double-masked), wearing face shields, socially distanced by six to  
2 12 feet and separated by plexiglass from counsel and other jurors”).

3 Plaintiffs are mindful that preparation for the District’s first remote civil jury trial will require a  
4 substantial commitment of Court time and resources, and plaintiffs’ counsel and their staffs are prepared  
5 to devote the time and resources to ensure the trial is a success. One option, following the example of  
6 other courts, would be to appoint a Zoom Trial Special Master or other neutral party for special  
7 designated technology support. *See, e.g., D.M. v. Wesley Medical Center*, No. CV 18-2158-KHV, 2021  
8 WL 168925, at \*1-2 (D. Kan. Jan. 19, 2021); *Flores*, 2020 WL 5211052, at \*3. Committing to a remote  
9 trial now would be the best course, because “even if the pandemic environment seems to be improving,  
10 on the surface, the Court cannot wait until the last minute or even defer the question whether an in-  
11 person trial can safely occur” in a few months. *Kieffaber*, 2021 WL 425822, at \*5 (ordering on February  
12 8 that trial on April 19 proceed remotely). As the court in *Kieffaber* concluded:

13           The Court will not make the parties wait another unknown number of months  
14           (possibly years) until it is safe to resume in-person jury trials and the District’s  
15           pandemic backlog (an ever-growing backlog) of criminal jury trials has been  
16           cleared—particularly when it is possible to conduct a remote jury trial in a manner  
17           that ameliorates each of defendants’ objections and satisfies Rules 77(b) and 43(a).

18 *Id.*

19 ***Chart’s Position.***

20 Chart objects to Plaintiffs’ inclusion of the position statement above as Chart believes it is  
21 inappropriate in the case management statement and would be appropriate for a joint letter brief, which  
22 was never discussed between the parties. Subject to and without waiving its objection, Chart includes  
23 the following brief statement of its objection to a remote trial, and will be prepared to address this issue  
24 with the Court at the CMC and by letter brief if requested.

25 Chart objects to conducting a remote Zoom trial. Contrary to Plaintiffs’ claims, a short  
26 continuance in the trial date does not equate to an “indefinite delay.” In-person jury trials are resuming  
27 around the country, and Chart expects that an in-person jury trial in this matter will be feasible in short  
28 order and in 2021. The prejudice Plaintiffs claim by a five or six month delay will be vastly outweighed  
by the prejudice Chart will sustain if forced to proceed with a remote Zoom trial over its objection.

1 Further, this first trial is merely the first in line for 150+ cases in this matter. If compelled by the Court,  
2 a remote Zoom trial in May 2021 would be conducted entirely under objection by Chart and Chart  
3 would not view the remote Zoom trial as having any representative value in assisting with resolution for  
4 the 150+ remaining cases outstanding. As such, proceeding with a remote Zoom trial over Chart's  
5 objection would not only deprive Chart of its right to an in-person jury trial and tie up the parties in a  
6 timely and costly appeal, but it would do nothing to move toward resolution the broader universe of  
7 cases.

8 The Court provided clear guidance on this issue at the last conference: "But the main thing is, a  
9 jury trial, the jury would have to be virtual – right? – because that's the biggest risk. That's the biggest  
10 risk. And so I just – so that's all I would say, is the jury would have to be virtual. The parties all would  
11 have to agree a hundred percent to that. And then I'd have to inquire. And what's different about this  
12 case, too, is that it's a long trial, and so I don't know that they'd be willing to do it. But I certainly  
13 would be happy to ask and inquire once there was agreement from the parties that they would do it if  
14 allowed to do so." (Trans. of Proceedings Jan. 20, 2021 at 12-13)

15 As stated above, Chart does not agree to proceed with a remote Zoom trial. Chart will be  
16 prepared to address this issue at the case management conference and submit a formal letter brief on this  
17 issue if requested.

### 18 **III. ADDITIONAL CASES**

19 With respect to the first Additional Case (November 8, 2021 trial), the parties have commenced  
20 discovery in accordance with the case schedule. Dkt. No. 620. Plaintiffs in the first Additional Case  
21 have provided Chart with their PFC medical records; on February 22, 2021, Chart requested signed  
22 medical record authorizations for additional providers in order to obtain a complete set of the plaintiffs'  
23 medical records, and Plaintiffs anticipate returning executed copies shortly.

24 With respect to the second Additional Case (April 11, 2022 trial), the parties have selected  
25 Plaintiffs and submitted a case schedule for Court approval.

### 26 **IV. ARBITRATION PROCEEDINGS**

27 The approximately 200 arbitrations subject to a coordination protocol have initiated, a schedule  
28 has been entered, and the cases are proceeding.

**V. ADR UPDATE**

In accordance with the Court's guidance at the last case management conference, the parties have conferred regarding a plan for alternative dispute resolution. The parties have agreed to proceed with private mediation before Michael G. Ornstil with JAMS San Francisco.

\* \* \*

The parties request that the Court hold another status conference at the Court's convenience in late-March, with a further joint case management statement to be submitted prior to the conference.

Dated: February 23, 2021

**GIRARD SHARP LLP**

By: /s/ Dena C. Sharp

Dena C. Sharp (State Bar No. 245869)

Jordan Elias (State Bar No. 228731)

Adam E. Polk (State Bar No. 273000)

**GIRARD SHARP LLP**

601 California Street, Suite 1400

San Francisco, California 94108

Tel: (415) 981-4800

Fax: (415) 981-4846

dsharp@girardsharp.com

jelias@girardsharp.com

apolk@girardsharp.com

Eric H. Gibbs (State Bar No. 178658)

Dylan Hughes (State Bar No. 209113)

Amy M. Zeman (State Bar No. 273100)

**GIBBS LAW GROUP LLP**

505 14th Street, Suite 1110

Oakland, CA 94612

Tel: (510) 350-9700

amz@classlawgroup.com

Adam B. Wolf (State Bar No. 215914)

Tracey B. Cowan (State Bar No. 250053)

**PEIFFER WOLF CARR KANE &**

**CONWAY, APLC**

4 Embarcadero Center, Suite 1400

San Francisco, CA 94111

Tel: (415) 766-3545

Fax: (415) 402-0058

awolf@peifferwolf.com  
tcowan@peifferwolf.com

*Plaintiffs' Counsel*

Dated: February 23, 2021

By: /s/ Kevin M. Ringel  
Marc G. Cowden (SB No. 169391)  
Adam Stoddard (SB No. 272691)  
**SHEUERMAN, MARTINI, TABARI,  
ZENERE & GARVIN**  
1033 Willow Street  
San Jose, California 95125  
Tel: (408) 288-9700  
Fax: (408) 295-9900  
mcowden@smtlaw.com  
astoddard@smtlaw.com

John J. Duffy (SB No. 6224834)  
Kevin M. Ringel (SB No. 6308106)  
**SWANSON, MARTIN & BELL, LLP**  
330 N Wabash, Suite 3300  
Chicago, Illinois 60611  
Tel: (312) 321-9100  
Fax: (312) 321-0990  
jduffy@smbtrials.com  
kringel@smbtrials.com

*Counsel for Defendant Chart, Inc.*

**FILER'S ATTESTATION**

Pursuant to Civil L.R. 5-1(i)(3), regarding signatures, I, Dena C. Sharp attest that concurrence in the filing of this document has been obtained.

Dated: February 23, 2021

/s/ Dena C. Sharp  
Christina (Dena) C. Sharp